(3092)

IN THE

Supreme Court of the United States

October Term, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NEW YORK

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Statement

Since the appeal was taken in the captioned case, the New York State Court of Appeals unanimously decided *Liberty National Bank and Trust Co.* v. *Buscaglia, et al.* on December 27, 1967. This case is reported at 21 N. Y. 2d 357, and the opinion of the Court (KEATING, J.) is reproduced as Appendix B hereto.

The *Liberty Bank* decision, *supra,* sustained the constitutionality of sales and use taxes imposed under New York State and local laws upon retail sales transactions entered into by Liberty National Bank of Buffalo, New York.

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This brief is submitted in support of the principles that national banks are not entitled to implied constitutional or statutory immunity from such taxation.

While we have received a copy of appellant's brief herein, we have not yet received one from the appellee as of the date of this brief.

Question Presented

Whether national banks, privately owned and operated for private gain, as are State banks, are immune from nondiscriminatory State and local sales taxation.

Summary of Argument

We shall argue and demonstrate that a national bank is not today a Federal instrumentality and has no immunity from State and local sales taxes.

It is crystal clear that the term "Federal instrumentality", for purposes of constitutional immunity, means different things at different times and for different purposes. Immunity may be gained or lost depending upon whether a Federal function is actually performed or not. In the case of national banks, the term "Federal instrumentality" is a complete misnomer, and this immunity has been lost. They now stand upon entirely different footings from the national banks of an earlier-by-gone day when they once enjoyed immunity; footings which this Court and the Congress itself have since rebuilt in many different ways so that they no longer perform the governmental functions which had given birth to the immunity doctrine long ago. There is and can be no dispute as to this, and appellant's mere and unfounded assertion that it is a Federal

instrumentality is neither justified nor relevant under present circumstances.

When as here, governmental functions have ceased to exist, then the basis for an assertion of a doctrine of implied immunity has no justification and it is wholly inapplicable. We shall also clearly demonstrate that national banks presently function with respect to their depositors within the Nation's Federal Reserve System, in full functional parity with State banks belonging to that very same system, and both State and National banks are in banking competition with each other under their respective governing legislation (*i.e.*, the National Banking Act, 12 U. S. C. A. §§ 21, *et seq.;* New York State Banking Law). National banks perform no function for the Federal government which is not similarly performed by State banks within the Federal Reserve System. Both are free to convert from one to the other and back again in their discretion under the cited governing statutes.

When Liberty Bank converted from a State bank, for example, to a National bank, it did not acquire any new or different status or relationship to the Federal government than it had before. The only banking changes which occurred by its conversion were solely in areas involving *private* banking as a result of enlarged authorization under the National Banking Act to engage in additional private banking activities, presently denied to New York banks by New York Law. (See *Report of the Advisory Committee on Commercial Bank Supervision,* submitted to the Superintendent of Banks of the State of New York, December 1965.) This contains a comprehensive report of these additional private banking activities. (See also 1966 *Report of the Joint Legislative Committee to revise the Banking Law,* 1966 *Leg. Doc. No.* 39.) Amendatory New York State

legislation would have been required in certain areas for State banks to do what national banks may do.[1] Chapter 324 of the Laws of 1966 for example, was enacted to permit State banks additional banking activities in eight of these areas. (See 1966 Annual Report of the Superintendent of Banks, *1967 Leg. Doc.* No. 90, pp. 9-10.)

By reason of both the sharp curtailment of the application of the immunity doctrine (*infra*) and of the profound changes in the banking functions of national banks, extreme caution is required in the interpretation and application of earlier cases now isolated by time and place which had evoked the doctrine under entirely different legal and factual circumstances. This mandates a rigid and analytical delineation between the earlier cases for purposes of their modern application, since all must be interpreted and compared in the light of the precise governmental agency and of the precise governmental activity involved.

Since § 548 of the U. S. C. A. is not the *sole* measure for taxing national banks, they have no statutory immunity thereunder from non-discriminatory sales and use taxes imposed by the States. The section does not prohibit these taxes, but applies solely to those taxes enumerated therein.

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[1] These areas are:

(1) Direct Lease Financing; (2) Accounts Receivable Financing; (3) Negotiable Promissory Notes; (4) Domestic Branches; (5) Federal Funds Transactions; (6) Investment Securities; (7) Bank Stock as Collateral; (8) Loans to Officers and Directors; (9) Acquired Branches; (10) Travel Services; (11) Foreign Branches.

ARGUMENT

Since national banks no longer fall within the implied constitutional immunity doctrine by reason of the change in their banking functions, they are not immune from State or Local Sales and Use Taxes.

A. INTRODUCTORY

The scythe of time produces significant and fundamental changes, especially in the field of constitutional law. This, as this Court has found, compels sophisticated distinction, application, and often total isolation of past-decisional law. For those seeking the protective cloak of inter-governmental immunity, prior decisions must be reexamined and reevaluated in their historical setting and in view of the precise factual circumstances to which then existing principles were applied at the particular time. If not done, grievous misconstruction of prior cases occurs, since in this area, as in perhaps no other, this Court has admonished (*Oklahoma Tax Comm.* v. *Texas Co.*, 336 U. S. 342, 352 [1949]):[2]

> "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.

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[2] This case overruled five earlier cases involving the immunity doctrine, *viz.*: *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292 (1914); *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522 (1916); *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503 (1918); *Large Oil Co.* v. *Howard*, 248 U. S. 549 (1919); *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521 (1936).

> "Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point, together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge."

It is for this reason, as we shall show, the case of *McCulloch* v. *Maryland*,[3] 4 Wheat. 316 [1819], upon which appellant bottoms its claim to immunity from these non-discriminatory taxes, must be isolated in time and place for it has no modern application to them and grants no immunity.

This Court's restriction of the implied immunity doctrine has been pragmatic and deliberate in the past forty years, as its opinions clearly show. As with other constitutional doctrines it is not an absolute, and its severe limitation today stems, for reasons of comity, from a realistic awareness that the States must be accommodated by permitting them to enact revenue measures under their reserved tax powers to meet the rising costs of government. Consequently, all cases in this area must be construed and applied with extreme caution because, as this Court has also warned, they all require "the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both

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[3] In *McCulloch*, the State of Maryland attempted to tax the operations of the Bank of the United States, while at the same time it exempted from the same tax State banks conducting their banking business within its borders. This, of course, was unconstitutional discrimination. Later, Ohio attempted this same tax discrimination and this, too, was similarly struck down in *Osborn* v. *Bank of the United States*, 22 U. S. 738 [1824], a case relied upon by respondent, as well. *McCulloch* involved an attempt by Maryland to impose a 2% tax upon circulating paper currency issued by the Bank of the United States; *Osborn* involved an attempt by Ohio to impose a tax of $50,000 on each office of the Bank in the state. In both cases, state-chartered banks were specifically exempted from these taxes.

Nation and State under our dual system" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 150 [1937]). Where, as here, there is no interference by these taxes with any jurisdiction asserted by the Federal Government, "the sovereign rights in this dual relationship are not antagonistic" (*Howard* v. *Commissioners*, 344 U. S. 624, 627 [1952]). Even where the United States itself claimed governmental immunity from State taxes on behalf of its lessees, for example, this Court stated "In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law" (*United States* v. *City of Detroit*, 355 U. S. 466, 474 [1957]; see also *United States* v. *Township of Muskegon*, 355 U. S. 484; *City of Detroit* v. *Murray Corp.*, 355 U. S. 489).

It is for these reasons that this Court, from time to time, has consistently stated, for example, "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions *performed by its officers and agents*" (*Penn Dairies* v. *Milk Control Comm.*, 318 U. S. 261, 270 [1942], emphasis added), *i.e.*, it "should not be reversed" (*Oklahoma Tax Comm.* v. *United States*, 319 U. S. 598, 610 [1942];[4] *Mayo* v. *United States*, 319 U. S. 441, 447 [1942]). This stems "as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax" (*Oklahoma Tax Comm.* v. *Texas Co., supra*, 336 U. S. 342, 364-365). A trend[5] not to extend such immunity is now so firmly estab-

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[4] This case, overruled an earlier immunity one, *viz.*: *Childers* v. *Beaver*, 270 U. S. 555 (1926).

[5] Coincidentally, of course, this very same trend has occurred, and for the same reasons, as to the taxation of interstate and foreign

(Footnote continued on following page)

lished as to be beyond recall. This is why this Court, observing that, the former immunity exemption "process has been reversed in direction", and *carefully* noted that "True intergovernmental immunity remains for the most part" (*Texas Co., supra,* p. 365), nevertheless, stated it is not to be extended to *private* corporations or persons (*ibid.,* p. 365):

> "* * * But, so far as concerns *private* persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption." * * * (Emphasis added.)

Appellant's erroneous arguments concerning today's private national banks and the "nation's concerns," as it puts it, run squarely counter to this Court's decisions of the past thirty years in the areas of State sales and use taxation and the implied immunity doctrine.

(Footnote continued from preceding page)

commerce where former constitutional principles no longer apply because "it is axiomatic that the founders did not intend to immunnize such commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the State" (*Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450 [1958]; see also *Scripto* v. *Carson,* 362 U. S. 207 [1957]; *General Motors Corp.* v. *Washington,* 377 U. S. 436 [1963]). The reason being, as the Court said at the same term in which it decided *Northwestern, supra,* "the reconciliation of the competing demands of constitutional immunity and of the states' power to tax, is an extremely practical matter" (*Youngstown Co.* v. *Bowers,* 358 U. S. 534, 535). As to foreign commerce, an express immunity—not implied—see *e.g., Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652 [1944]; *Atlantic Gulf & Pacific Co.* v. *Gerosa,* 16 N. Y. 2d 1 [1966], app. den. 382 U. S. 368; *Shell Oil Co.* v. *State Board,* 414 P. 2d 820 [1966]; app. den. 386 U. S. 211 [1967]).

I. National banks, privately-owned-profit-making corporations performing no unique governmental functions, must be treated no differently from state banks.

The historical change in the function of the national banks has destroyed any claim that they are now Federal instrumentalities so as to be presently immune from State and local sales and use taxes. The history of American Banking, for present purposes may be divided into three historical periods. Each has produced profound changes in banking functions which are of the utmost relevancy here (*Money,* M. L. Burstein 1963 Edition; *The Economics of Money and Banking,* Lester V. Chandler, Third Edition, 1959). The issues here involved will require a full understanding and consideration of the changes which occurred during these three periods, since such changes have destroyed all claim by national banks to constitutional immunity as Federal instrumentalities performing federal governmental functions.

These historical periods are: (1) the pre-Civil war period, 1782-1863; (2) the post-Civil war period, 1863-1913, and (3) 1913 to date.

The most profound change, having far-reaching ramifications upon the *currency* of the United States, occurred throughout the first two periods, and during the first part of the third. In a final analysis, the functions of national banks with respect to such *currency was the only justification for the immunity doctrine in the first place.*

Briefly, the effect upon the Nation's currency was brought about by reason of the change in the manner in which credit was extended by both State and Federal banks to their private customers through the issuance of bank notes. These respective bank notes were issued during the

first two periods and they circulated from hand to hand, and for the most part constituted the public's only means of monetary payment in satisfaction of obligations. This function, however, no longer exists today, since the means of extending credit to bank customers and the means of payment now consist almost entirely of bank deposits upon which checks are drawn, which circulate in lieu of currency, or of circulating notes issued by the Federal Reserve Banks.

The Three Periods in the Development of American Banking.

(1) *The First Period, 1782-1863; McCulloch and Osborn Decisions.*

It was during this period that the first bank in the United States, the Bank of North America, was established as a private banking institution in 1782, a few years before the Federal government was formed under the United States Constitution. In 1791, however, the First Bank of the United States was chartered by Congress as the "fiscal agent" of the United States and it existed until 1811. The Second Bank of the United States was chartered by Congress in 1816 and it continued until 1836 when, amid considerable public controversy between its president, Nicholas Biddle, and the President of the United States, Andrew Jackson, its charter expired. No such bank has ever been chartered since. It was this bank and its functions which were the subject of Chief Justice MARSHALL's opinions in *McCulloch* v. *Maryland,* 17 U. S. 316 (1819), and in *Osborn* v. *Bank of United States,* 22 U. S. 738 (1824). Appellant principally relies upon *McCulloch, supra,* to support its contention that it is a "federal instrumentality" constitutionally immune from the taxes here involved. It must be plain, however, that it has no present-day relevancy nor

application to it or to the issues involved in this proceeding. Its relevancy in the instant case is only to point out, in sharp contrast, its total inapplication. Both these cited cases involved attempts by two different states to impose discriminatory taxes upon a partly government-owned bank performing vital governmental functions, *none of which are now performed by national banks.*

In *McCulloch* and *Osborn*, the States of Maryland and Ohio respectively, attempted to tax the operations of the Bank of the United States, while at the same time they exempted from the same tax State chartered banks conducting their banking business within the borders of those respective States. Clearly cases of unconstitutional discrimination.

The taxes there in question appear not to have been revenue measures, so much as political measures specifically designed to make it difficult for the Bank of the United States to operate. *McCulloch* involved an attempt by Maryland to impose a 2% tax upon circulating paper currency issued by the Bank of the United States; *Osborn* involved an attempt by Ohio to impose a tax of $50,000 on each office of the Bank in the state. In both cases, state-chartered banks are specifically exempted from these taxes.

In striking down this discriminatory legislation, Chief Justice Marshall specifically recognized that states could impose nondiscriminatory taxes on the property of the Bank, saying (17 U. S. at 436):

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in

common with other property of the same description throughout the state."

The Bank of the United States, which the *McCulloch* and *Osborn* decisions involved, was no mere private business corporation, like the national banks of today. Instead, it was a partly government-owned central bank, performing vital governmental functions. The degree of the Federal Government's involvement in the operations of the Bank of the United States is illustrated by the following facts:

(1) The Federal Government subscribed to and owned 20% of the capital stock of the Bank, with the remaining stock held by private persons. The President of the United States had the power to appoint five of the twenty-five members of the board of directors of the Bank (in addition to the Federal Government's right, as a stockholder, to participate in elections of the Bank's remaining directors).

(2) The Secretary of the Treasury of the United States was required to deposit all public money of the Federal government in the Bank, or if he did not do so, was required to report his reasons for not doing so to Congress.

(3) The Bank was required to transmit funds for the Federal government without charge.

(4) Circulating paper currency issued by the Bank was made legal tender for payment of all debts owing to the Federal government; furthermore, where debts to the Federal government were paid in circulating paper currency issued by State-chartered banks, the Bank of the United States collected these notes in specie from the issuing institutions.

(5) The Bank acted as fiscal agent for the United States and handled its foreign exchange transactions.[6]

Chief Justice MARSHALL, in concluding in *McCulloch* and *Osborn* that the taxes attempted to be imposed on the Bank by Maryland and Ohio were unconstitutional, stated that the Bank of the United States was an "instrumentality" of the Federal government. This statement, however, was not based on the mere fact that the Bank was chartered by the United States, *but rather was based upon an analysis of its actual governmental functions.*[7] Thus, in the *Osborn* decision, Chief Justice MARSHALL, pointed out that the Bank was "the great instrument by which the *fiscal operations of the government are effected*" (22 U. S. at 860), and that:

> "*We do not maintain that the corporate character of the bank exempts its operations from the action of state authority.* If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. *The operations of the bank are believed* not only to yield the compensation for its services to the government, but *to be essential to the performance of those services.* Those operations give its value to the currency in which all the transactions of the government are conducted. * * * The business of the bank constitutes its capacity to perform its functions, *as a machine for the money transactions of the government.*" (22 U. S. at 862-3, emphasis supplied.)

> "*If the trade of the bank be essential to its character as a machine for the fiscal operations of the government,* that trade must be as exempt from the state control as the actual conveyance of the public money." (22 U. S. at 867, emphasis supplied.)

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[6] Source: *Financial History of the United States*, Studenski and Kroos (McGraw-Hill, 1952), pp. 83-88, 103-106.

[7] See also a more detailed discussion under III, *infra*.

(2) *The post-Civil War Period, 1863-1913; Owensboro Decision, etc.*

Largely to finance the Civil War and to protect the currency, Congress enacted the National Bank Acts of 1863 and 1864. The National Bank Act of 1864 was significantly entitled "An Act to Provide a National Currency, Secured by a Pledge of United States Bond and to provide for the Circulation and Redemption thereof". For a detailed discussion of the reasons prompting the enactment of this Act, see *Banking Studies,* 1941, pp. 10-12, 41-46, published by the Board of Governors of the Federal Reserve System.

This act, in large measure, provided for the circulation of the nation's paper currency, and made such currency legal tender for all debts owing to the Federal government or payable by it. To insure the protection of such currency against insolvency of the issuing bank, each bank was required to secure its currency by depositing United States bonds with the Treasury Department; to protect against forgery and over-issuance, this currency was printed for issuing banks by the Treasury Department. On the other hand, however, state banks were effectively forced out of the business of issuing their own bank notes by the imposition of a Federal tax of ten per cent of the principal amount of their bank notes under a statute which was designed to give national banks a monopoly in this particular area (13 Stat. 484 [1865], carried over into the Internal Revenue Code, present Code § 4881, subd. b). The constitutionality of this Federal tax imposition was sustained in *Veazie Bank* v. *Fenno,* 75 U. S. 533 (1869).

Indeed, we submit that the very enactment of this 1864 Act was significantly portentous. The Act itself marked a radical departure from and was an historic *exception* to the

implied immunity doctrine which since has been even more vastly curtailed in its present day application by both the Congress and by this Court, as shown herein. This Act was the first Congressional recognition that even privately owned national banks, thereby authorized and which were to function for a time thereunder, were not to be fully protected by the immunity doctrine, in any event, despite its existence. This is made quite clear by the Congressional authorization to permit their taxation by the States at the very same time they were to be subjected to Federal taxation also (13 Stat. [1864], ch. 106, § 41, pp. 111-112). A fair reading of the Congressional debates in their entirety, construed out of context by the appellant, shows that the Congress was concerned *essentially* with the taxation of true "instruments" of the United States government, *as they then existed,* especially as to the effect upon the Nation's *currency,* which, of course, prompted enactment of the Act in the first place. Despite this concern, however, State taxation was permitted because the authorized taxes were not upon the bank's *operations,* as was the case in *McCulloch* v. *Maryland, supra,* (see *e.g., Cong. Globe,* 38th Cong., 1st Sess., Vol. 34, Part 2, pp. 1890 *et seq.*). It is for this reason that cases like *Bank of California* v. *Richardson,* 248 U. S. 476 [1919], and similar ones, also erroneously cited by appellant, are wholly distinguished and inapplicable here. As the *Richardson* opinion notes, for example, the State tax struck down there was because it impaired the bank's *operations* (*ibid.,* p. 483). Such is not the case here (see also, pp. 19-20, 50, 52-55 herein).

Isolated in time and place, as are *McCulloch* and *Osborn,* is the decision in *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664 (1899), decided during the second period, upon which appellant also unjustifiably relies. This case,

too, was decided at a time when national banks were actively engaged in performing the essential "governmental" function of issuing their own bank notes which served as the Nations' currency, a situation no longer existing today. At that time, this Court quite properly ruled in the *Owensboro* case, that a State tax imposed upon intangible property could not be applied to a national bank. We must point out, however, that there was no attempt made therein as is the case now, to determine whether such banks as they then existed actually *performed any governmental* function. Consequently, as the opinion clearly shows, the language from *McCulloch* and *Osborn* cases, *supra,* was merely applied mechanically, which in substance was to the effect that the original Bank of the United States was a "Federal instrumentality" which, of course, it was, as previously shown. There was no attempt made to *analyze* the functions of national banks at the period of the *Owensboro* litigation to determine whether they were in any way similar in organization, ownership or operation to that of the original Bank of the United States. But even if there had been such an analysis, the functions of present-day national banks are completely different from those in 1899, since they no longer perform the unique "governmental" function of issuing circulating bank notes.

Although the *Owensboro* decision has been cited from time to time by subsequent cases decided by this Court, the later cases merely contain *obiter dicta,* to the effect that national banks were Federal instrumentalities. While either rejecting or upholding the taxes involved on national banks, the cases made no attempt to *analyze* the bank-operations of national banks as "governmental" functions (see *e.g. First National Bank* v. *Anderson,* 269 U. S. 341

[1926]; *First National Bank* v. *Hartford,* 273 U. S. 548 [1927]; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239 [1931]; *Colorado National Bank* v. *Bedford,* 310 U. S. 41 [1940]; *People ex rel. Bridgeport Savings Bank* v. *Feitner,* 191 N. Y. 88 [1908]).

None of these cases was decided on Constitutional grounds. All except one involved a tax on national bank shares, specifically mentioned in § 548 of the National Bank Act[8] (12 U. S. C. A.), and rested upon that provision, which is not relevant nor applicable here. The sole exception was the case of *Colorado Bank* v. *Bedford,* 310 U. S. 41, *supra,* a case which, indeed, is perfectly consistent with our position, in any event, as we will show, *infra,* p. 52.

We emphasize once again that the *Owensboro* case, *supra,* was decided during the second banking period when national banks were still performing Federal governmental functions. At the same time and during this very period, in 1873, however, this Court squarely held that the mere fact that a private business corporation is Federally chartered does not immunize it from non-discriminatory State taxation which does not interfere with an essential governmental function performed for the Federal government (*Union Pacific R. R. Co.* v. *Penniston,* 85 U. S. 5 [1873])[9]. This Court ruled in that case that a private railroad corporation operating under a Federal charter and performing certain services for the Federal government, such as carrying the mails, is not constitutionally immune from a non-discriminatory State property tax. This Court specifically rejected the railroad's argument that its Federal charter conferred immunity from State taxation (*ibid.* pp. 33-34):

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[8] § 548 is reproduced as Appendix A hereto.

[9] See also a more detailed discussion under III, *infra.*

"It is, however, insisted that the case of [a state-chartered railroad which had previously been held by the Court to be subject to state taxation] differs from the case we have now in hand in the fact that it was incorporated by the * * * legislature of the state of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. * * * The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas."

The national banks today fall into this same category, and this Court no longer regards "private persons or firms" which perform various services for and on behalf of the Federal government as immune from non-discriminatory State taxation.

It is clear, therefore, as we urge, that the mere mechanism of Federal chartering does not envelope private business corporations, such as national banks, with the implied immunity doctrine. Quite the contrary, the historical development of this judicial doctrine clearly demonstrates that it is invoked solely: (1) where actual governmental functions are involved, and, (2) where those functions have been unduly interfered with. This was made abundantly clear by this Court when, for example, in analyzing the cases of *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank,* 22 U. S. 737; *Union Pacific Railroad Co.* v. *Peniston,* 18 Wall. 5; *California* v. *Central Pac. R. R. Co.,* 127 U. S. 1, it stated (*Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 152 [1910]):

"An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal government in its sovereign capacity, and the

> attempted taxation was an interference with the effectual exercise of such powers."

Later cases, of course, clearly re-affirm this distinction. We point out that the sales taxes imposed by the State of New York are certainly not imposed upon any banking function or any operation, in any event; they are imposed solely upon private business "retail sales transactions" (New York Tax Law § 1105; Erie County [New York] Sales Tax Law § 2[a]).

We respectfully submit that appellant fails to recognize the fundamental and valid distinction existing between *private* business corporations, such as national banks, created under *permissive* Federal legislation and engaged in private business, on the one hand, and, on the other hand, those actual Federal fiscal agencies *created* by Congress by specific legislation to perform Federal functions, such as those fiscal agencies itemized herein. Because of this distinction, as the cases clearly show, the implied immunity doctrine may afford tax exemption to this latter group; whereas the doctrine is inapplicable to the former. This has been so ever since the decision in *Osborn* v. *U. S. Bank*, 22 U. S. 737, 858, *supra* (see also, *e.g., Union Pacific Railroad Co.* v. *Peniston, supra,* 85 U. S. 5 [1873]; *Susquehanna Co.* v. *Tax Commission,* 203 U. S. 291, 294 [1930]; and *Union Bank and Trust Co.* v. *Phelps,* 288 U. S. 176, 180-181 [1932]).

(3) *The Third Banking Period, 1913 to the present.*

a. *Changes in Banking Functions of National Banks.*

From the end of the Civil War to the first decade of the Twentieth Century, national bank notes, along with "greenback currency" issued directly by the Treasury Depart-

ment, were the principal paper currency which circulated in the United States. However, recurring monetary crises, largely resulting from the inflexibility of national bank currency, prompted the formation of the Federal Reserve System in 1914 (12 U. S. C. A. § 221, *et seq.*), and shortly thereafter that system became the principal issuer of paper currency.[10]

The Federal Reserve System was created by Public Law, No. 43, 38 Stat. 251, 66 Cong. 21 sess. (Title 12 U. S. C. A., § 221, *et seq.*), and its preamble significantly states "An Act to provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscountnig commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

The System's relationship to circulating currency is far more important in American banking than is that of commercial banks, since, for example, its responsibilities govern national monetary and credit conditions: "The Federal Reserve Banks are the only banking institutions in the United States that can *issue currency.* Commercial banks can release existing currency for circulation but they cannot create a new supply." (*Banking Studies,* 1941, p. 240, *supra.* That is, the Federal Reserve

[10] The inflexibility of national bank currency arose because bank notes issued by national banks had to be secured by governmental bonds. As a result such banks were inclined to reduce the amount of their currency in circulation during periods of tight money, when investing in government bonds became less profitable than making loans, and, conversely, to increase their bank note circulation in periods of plentiful credit, when government bonds became the desirable investment. The effect of this was to reduce the supply of money in periods of tight credit, when it was needed most, and to increase the supply of money in periods of plentiful credit, when it was needed least.

System "can draw upon a power no commercial bank can exercise. This is the power to create money in the form of either currency or bank deposits" (*ibid.* pp. 239-240). Consequently, this System is a "true instrumentality" of the United States which is superimposed upon the banking system of the United States, superseding the national banks, and is more akin to the old Bank of the United States, *supra*, for purposes here, since Federal Reserve Banks are designated as "Government depositaries and fiscal agents" (Title 12, *supra*, § 391). For these reasons, among others, Congress specifically immunized these banks from taxation: "Federal reserve banks, including the capital stock and surplus thereon and the income derived therefrom, shall be exempt from Federal, State, and local taxation, except taxes upon real estate" (Title 12, *supra*, § 531). Unlike national banks, the *public* interest and not *private gain* is the purpose of operation of Federal Reserve Banks (*Banking Studies, supra*, pp. 231-233).[11]

The year 1935, is the cutoff date for the circulation of national bank currency, and is decisive in answer to appellant's "Federal Instrumentality" argument. For a long time prior thereto, national banks had failed to issue their circulating notes to the full amount permitted by the volume of Federal bonds authorizing and securing such notes, and on August 1, 1935, the last of the Federal bonds securing the privilege were retired. Upon the retirement of these bonds, national banks deposited sufficient funds with the Treasury Department to cover their outstanding notes and that department assumed liability for them. Any outstanding

[11] For an authoritative discussion of the functions of the Federal Reserve System as displacing the former functions of national banks, the Court is referred to *Banking Studies, 1941, supra*, and to *The Federal Reserve System, Purposes and Functions*, 1963, also published by the Board of Governors of that system.

notes are now being cancelled as rapidly as they are received and only a very small portion is outstanding at the present time (See *Financial History of the United States*, Studenski and Kroos, 1952, p. 393).[12]

The original reason for the application of the immunity doctrine to national banks *terminated* when this radical change in their currency function occurred. The relationship of national banks to the Federal government since that time is no different from that of State banks which belong to the Federal Reserve System, a regulatory relationship and both these banks are subject to the taxes here involved.

Unlike Federally chartered *public* corporations owned and operated by the government, national banks like their State counterparts, are privately owned, managed and operated for profit as business corporations engaged in the highly competitive banking field, the profits of which in both cases inure to the banks and to their stockholders— not to any government. The principal business of both types of banks is to accept deposits, to make various loans to their private customers, and to make their own invest-

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[12] Circulating notes of national banks upon deposit of United States bonds was authorized by Title 12 U. S. C. A. §§ 101, 101a. The annotation to § 101a states:

"Redemption of Bonds. In a communication from the Treasury Department dated February 17, 1941, it was stated: 'The Secretary of the Treasury called for redemption of the only outstanding issues of United States bonds bearing the circulation privilege as follows:

'2% Consols of 1930, as of July 1, 1935.

'2% Panama Canal bonds of 1916-36.

and

'2% Panama Canal bonds of 1918-39, as of August 1, 1935.'

"The retirement of these issues automatically put an end to the National Bank note circulation and the collection of the tax thereon."

For the reasons for the redemption of the bonds, see *Banking Studies, supra*, pp. 12, 308.

ments, restricted only by their respective regulatory statutes (*i.e.,* the National Banking Act, *supra,* and the New York State Banking Law). We point out, however, that these regulatory and supervisory statutes do not determine taxability. It is for this reason, therefore, that cases involving supervision of banks, by the Federal government in this area have absolutely no relevancy here (see *e.g., Advertising, Franklin National Bank* v. *New York,* 347 U. S. 373 [1953]; *Venue for litigation, Mercantile National Bank* v. *Langdeau,* 371 U. S. 555 [1962]; *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 330 [1962]; branch banking; *First Nat. Bank* v. *Walker Bank,* 385 U. S. 252 [1966]; *United States* v. *Third National Bank,* decided March 4, 1968, No. 86, Oct. Term, 1967). On the other hand, however this Court has consistently held that State law is applicable to national banks unless it *infringes* upon the National Banking Law, the banking laws of the several States, the Federal Deposit Insurance Act, or the Federal Reserve Act, or imposes an undue burden on the performance of their functions (see *e.g., First National Bank* v. *Kentucky,* 76 U. S. 353 [1870]; *McClellan* v. *Chipman,* 164 U. S. 347 [1896]; *First National Bank* v. *Missouri,* 263 U. S. 640 [1924]; *Anderson National Bank* v. *Luckett,* 321 U. S. 233 [1944]). Of course, the sales and use tax statutes involved herein obviously do not regulate or supervise national banks, nor are they discriminatory or arbitrary.

Because national banks are *private* corporations, Congress has provided innumerable instances for competitive equality between national and state banks. One of the historically dominant concepts of the Federal banking laws is to place national—and State banks on an equal footing in all important areas of competitive banking. Had Congress considered the question in 1864 or 1926, it is unlikely,

in view of this policy that it would have discriminated against State banks by exempting national banks from State sales and use taxes. Illustrative of the policy of maintaining the competitive equality of national and State banks is the fact that the National Bank Act expressly provides that national banks are subject to the restrictions of State law applicable to State banks with respect to establishment of branch offices (12 U. S. C. § 36), fiduciary powers (12 U. S. C. § 92a), maximum interest rates on savings and time deposits (12 U. S. C. § 371). Conversely, the Federal Reserve Act provides that State banks which are members of the Federal Reserve System are subject to the same restrictions as national banks with respect to investing in and underwriting securities (12 U. S. C. § 335).

The entire history of American banking has been one for competitive equality within the banking system of the United States in the services rendered by both national banks and State banks so that neither would be at a competitive disadvantage with the others. This concept would be destroyed if Appellant prevails. The competitive equality of national and State banks is specifically recognized by the National Banking Act which provides, for example, that State as well as national banks which are members of the Federal Reserve System may accept deposits of public monies of the United States government and its agencies (Title 12 U. S. C. A. § 265). Moreover, the Treasury Department and other Federal agencies are specifically enjoined by the same statute from discriminating in favor of national banks over State banks in their selection as depositories of public monies, as follows (*ibid.*, § 265):

> "Notwithstanding any other provision of law, no department, board, agency, instrumentality, officer, employee, or agent of the United States shall":

1. "issue or permit to continue in effect any regulations, rulings, or instructions or"
2. "enter into or approve any contracts or"
3. "perform any other acts having to do with the deposit, disbursement or expenditure of public funds, or"
4. "the deposit, custody, or"
5. "advance of funds subject to the control of the United States as trustee or"
6. "otherwise which shall discriminate against or prefer national banking associations, State bank members of the Federal Reserve System, or insured banks not members of the Federal Reserve System, by class, or which shall require those enjoying the benefits, directly or indirectly, of disbursed public funds so to discriminate."

The United States Treasury Department customarily keeps its revenues from taxes and bond issues, which are deposited in so-called "Tax and Loan Accounts", in both national and State banks until the funds are needed for governmental expenditure. As of June 30, 1965, for example, the Federal government's deposits in commercial banks in New York State totalled about three billion dollars, with six hundred seventy-seven million dollars deposited in national banks, as compared with *two billion three hundred million dollars in state banks* (Federal Deposit Insurance Corporation, "Assets, Liabilities and Capital Accounts, Commercial and Mutual Savings Banks," June 30, 1965). Equality is also achieved between State and national banks by Congressional authorization that both may underwrite the obligations of independent Federal agencies, such as the Federal Mortgage Association, and Federal Home Loan Banks (12 U. S. C. A., §§ 24, 335), and both actively compete, for example, for business engendered by the Federal Housing and Veteran Administra-

tions' loans. This concept for equality works both ways and it is for this reason that Congress, as its committee reports show, enacted in 1964 Public Law 88-341, 78 Stat. 233 (amending the Federal Reserve Act, 12 U. S. C. 37 § 371) to permit national banks to make real estate loans on certain forest tracts because: "State banks in at least two-thirds of the States operate under a more liberal statutory framework than do national banks in the area of loans on forest tracts and in more than one-third of the States there are no statutory restrictions at all. National banks should be permitted to act more effectively in this field and help meet the credit needs of the timber industry" (see 1964 *U. S. Code Cong. & Admin. News*, Vol. 2, p. 2305).

For the most recent judicial discussion of this concept of competitive equality see *First Nat. Bank* v. *Walker Bank*, 385 U. S. 252, 261 (1966).

Because State and national banks are similiar and perform essentially similar banking functions, both the State and national banking laws provide for each respective bank to convert from one to the other with comparative ease (such as the New York State Banking Law, §§ 136, 137; 12 U. S. C. A. 12, § 35). The Liberty National Bank, for example, converted from State to national banking status in 1963. Surely this mere act of conversion should not be the determinate for tax immunity. (See, *e.g., Union Pacific Railroad Co.* v. *Peniston,* 85 U. S. 5 [1873], and p. 18, *supra*.)

At the same time the Congress was assuring competitive equality between State and national banks, it also provided that both types of banks were to be treated no differently from other business corporations. National banks, like State chartered banks, are subject to; *Federal taxation* (1954 Internal Revenue Code, §§ 581 *et seq.*). (The Federal Reserve Banks are not. [12 U. S. C. A.,

§ 531]). National banks like State banks are subject to the Federal *anti-trust laws* (Sherman Act, 15 U. S. C. A. § 4, and Clayton Act, 15 U. S. C. A. § 15; *cf. United States* v. *Philadelphia National Bank*, 374 U. S. 321 [1962]; *United States* v. *First National Bank,* 376 U. S. 665 [1963]) *United States* v. *Third National Bank,* decided March 4, 1968, *supra;* No. 86, Oct. Term, 1967; to *labor laws* (National Labor Relations Act, 29 U. S. C. A.; *N. L. R. B.* v. *Bank of America,* 130 F. 2d 624 [C. C. A. 9]); to *securities laws* (1964 Securities Acts Amendments, 78 Stat. 568, amending many provisions of 15 U. S. C. A.) as well as any other Federal regulatory provisions.

In the *Bank of America* case, *supra,* the United States Court of Appeals squarely rejected the national bank's contention that as a "Federal instrumentality" it was exempt from the National Labor Relations Act (130 F. 2d 624, 627):

> "It is a privately owned corporation, privately managed and operated in the interest of its stockholders. *United States Shipping Board Emergency Fleet Corporation* v. *Western Union Telegraph Co.,* 275 U. S. 415, 416, 425, 48 S. Ct. 198, 72 L. Ed. 345. The United States did not create it, but has merely enabled it to be created. True, national banks are subject to strict regulation and supervision but so are a host of other private enterprises. It is true, also, that national banks may at times be called upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the primary purpose of the individuals who organize them."

b. *Congressional Acts Changing National Bank Status.*

Any thorough analysis of national banks, as they presently function, must involve a comparison between the abolition by Congress of their former governmental functions,

on the one hand, with the coincidental creation by Congress of numerous governmental agencies and corporations, which also operate within the framework of the banking system as an integral part thereof, and which effectuate the monetary and fiscal policies of the Federal government. These latter agencies and corporations are designated as "Federal agencies and instrumentalities" by specific acts of Congress and, of course, the doctrine of implied constitutional immunity certainly applies to them. Under the Government Corporation Control Act of 1945 (Public Law 248, 79th Congress, 31 U. S. Code 841), the Federal Government was reorganized for purposes of economy and efficiency in carrying out the various functions of the Federal government (For the legislative history of these reorganization acts, see U. S. Code Congressional Service, 1945, pp. 887-907; *ibid.* 1949, pp. 1381-1394). Further reorganization occurred with a subsequent Congressional act in 1949 (63 Stat. 203) and has been extended by subsequent acts in 1953, 1955, 1957, 1961, and 1964. Section 7 of the 1949 act defines the term "agencies" as meaning "any executive department, commission, counsel, independent establishment, government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the government." Nowhere in these reorganization acts is there any reference to or inclusion of national banks, although a long list of wholly owned government corporations were listed in the Senate Committee Report (1945 U. S. Code Congressional Service, *supra,* pp. 891-892). They are listed below.[13]

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[13] Cargoes, Incorporated;
Commodity Credit Corporation;
Defense Homes Corporation;
Defense Plant Corporation;
Defense Supplies Corporation;

(Footnote continued on following page)

Section 201 of the act defined the "mixed-ownership" government corporations and included the following:

Banks for Cooperatives (1 central and 12 regional banks)
Federal Deposit Insurance Corporation
Federal Home Loan Banks (12 banks)
Federal Intermediate Credit Banks
Federal Land Banks (12 banks)

(Footnote continued from preceding page)

Disaster Loan Corporation;
Export-Import Bank of Washington;
Farmers' Home Corporation;
Federal Crop Insurance Corporation;
Federal Farm Mortgage Corporation;
Federal Housing Administration;
Federal National Mortgage Association;
Federal Prison Industries, Incorporated;
Federal Public Housing Authority;
(or United States Housing Authority);
Federal Savings and Loan Insurance Corporation;
Federal Surplus Commodities Corporation;
Home Owners' Loan Corporation;
Inland Waterways Corporation;
Institute of Inter-American Affairs;
Institute of Inter-American Transportation;
Inter-American Educational Foundation Incorporated;
Inter-American Navigation Corporation;
Metals Reserve Company;
Panama Canal Company;
Petroleum Reserves Corporation;
Prencinradio, Incorporated;
Reconstruction Finance Corporation;
RFC Mortgage Company;
Regional Agricultural Credit Corporations;
Rubber Development Corporation;
Rubber Reserve Company.;
Saint Lawrence Seaway Development Corporation;
Smaller War Plants Corporation;
Tennessee Valley Associated Cooperatives Incorporated;
Tennessee Valley Authority;
United States Commercial Company;
United States Housing Authority;
United States Housing Corporation;
United States Spruce Production Corporation;
Virgin Islands Corporation;
War Damage Corporation;
Warrior River Terminal Company.

Elsewhere the act provided that no government corporation can be created to act as an *agency or instrumentality* of the United States except by or pursuant to congressional action (§ 304), and all government corporations now operating under state charters were required to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to re-incorporation by act of Congress (§ 304[b]). The 1949 act, unlike its predecessors, did not exempt a single agency of the executive branch from its scope, clearly showing its universal application. (The 1945 act had excepted such agencies as the Securities and Exchange Commission, the Federal Deposit Insurance Corporation and the Veterans Administration.)

Clearly, therefore, this is a clear-cut recognition by the Congress that national banks no longer can be classified as Federal instrumentalities.

II. National banks are not entitled to constitutional immunity from non-discriminatory sales taxation.

While these far-reaching Congressional changes concerning the functions of national banks described, *supra,* there were also epochal changes occurring in the decisions of this Court in the field of implied constitutional immunity. This judicial re-appraisal and restriction of the immunity doctrine warrants a brief re-emphasis because Congress, despite this change, has failed to respond in turn by immunizing national banks from non-discriminatory sales taxes of the kind involved. This inaction by Congress can only be construed as tacit approval to permit the States to act in this area of taxation, despite Appellant's erroneous views to the contrary.

At the time of the *Owensboro* decision (173 U. S. 664 [1898]), *supra,* this Court had adopted and applied the

general immunity doctrine that States could not, except to the extent specifically authorized by Congress, tax private persons or firms performing services for the Federal government. Not only were national banks regarded as constitutionally immune from State taxation, but so were: (1) Federal employees, *Dobbins* v. *Commissioners,* 41 U. S. 435 (1842); (2) private companies dealing with Indian lands, *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292 (1914); and (3) contractors dealing with the Federal government (*Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218 [1928]). The rationale of these cases was to carry to its extreme conclusion the famous dictum in the *McCulloch* decision that "the power to tax involves the power to destroy". In other words, this Court denied the States the power to levy even non-discriminatory taxes on individuals or firms performing services for the Federal government upon the theory that the States might conceivably exercise their taxing powers so as to interfere with the performance of those services. These persons were considered to be the "instrumentality" through which the government carried out its functions and, consequently, "* * * the salary or compensation for the service of the officer is inseparately connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt." (*The Collector* v. *Day,* 78 U. S. 113, 123 [1870].)

However, beginning in the late '30's this Court found that such doctrine was no longer appropriate and overruled it as inapplicable to: Federal employees (*Graves* v. *New York,* 306 U. S. 466 [1939]); private contractors dealing with the Federal government (see *e.g., Alabama* v. *King & Boozer,* 314 U. S. 1 [1942]; *United States* v. *Detroit,* 355 U. S. 466 [1957]; *United States* v. *Muskegon,* 355 U. S. 484 [1957]; *Detroit* v. *Murray Corp.,* 355 U. S.

489 [1957]; *United States* v. *Boyd,* 378 U. S. 39 [1964]; to those leasing Indian lands. *Oklahoma Tax Comm.* v. *The Texas Co.,* 336 U. S. 342 [1948]).

In his concurring opinion in the *Grave* case, *supra,* Mr. Justice FRANKFURTER referred to the earlier immunity doctrine as involving "sterile refinements unrelated to affairs" and pragmatically concluded (306 U. S. 490):

> "* * * The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice HOLMES' pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,* and this, too, when the financial needs of all governments began steadily to mount." [footnote omitted.]

This Court, as we have shown, has made it perfectly clear that it was overruling the earlier doctrine in its entirety rather than in its application to particular factual situations. For example, in the case of private contractors with the Federal government, as to whom non-discriminatory taxes have been sustained in the face of asserted constitutional immunity, this Court has stated (*United States* v. *Detroit, supra,* 355 U. S. 466, 474):

> "Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law."

And, in *United States* v. *Muskegon,* 355 U. S. 484, *supra,* this Court found a marked distinction between *private*

business firms performing services for the Federal government, on the one hand, which are subject to non-discriminatory State taxes, and those corporations actually *owned* or *controlled* by the Federal government, on the other which are true Federal "instrumentalities" and possess implied constitutional immunity. There, it was stated (355 U. S. 486):

> "The case might well be different if the government had *reserved such control over the activities and financial gain of* [*the contractor*] *that it would properly be called a 'servant' of the United States in agency terms. But here* [*the contractor*] *was not so assimilated by the government as to become one of its constituent parts.* It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them." (Emphasis supplied.)

At its last term, however, this Court upheld the constitutional immunity of the American Red Cross from the Unemployment Tax of the State of Colorado (*Department of Employment* v. *United States*, 358 U. S. 355 [1966]). A detailed examination of the factors impelling the decision therein clearly shows that national banks, on the other hand, as presently functioning, no longer possess implied constitutional immunity from the taxes involved here. In the *Employment* case, *supra*, it was stated (pp. 359-360):

> "Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U. S. C. § 1 *et seq.* Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our

Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government."

In sharp contrast, as the New York Court of Appeals concluded, national banks today certainly do not function as "an arm of the government", (*cf.* also *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 485 [1941]), and that Court found that national banks presently lack every essential element which immunizes the Red Cross. The opinion of the New York Court of Appeals distinguished national banks, as follows (Appendix B, 71-74):

> "The reasoning of the second case relied on by the bank clearly supports our conclusion regarding the status of national banks. In *Department of Employment* v. *United States* (*supra*) the court held that the American National Red Cross was a tax-immune instrumentality of the Federal Government. The court's analysis is significant and instructive. Mr. Justice Fortas, speaking for the court, wrote (385 U. S., *supra*, pp. 358-360): 'Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality * * * Congress chartered the Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit * * * Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors * * * By statute and Executive Order there developed upon the Red Cross the right and obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of

our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status as an arm of the Government.'

The contrast between activities and functions of the American National Red Cross and that of the Liberty National Bank and Trust Company is so striking that no further elaboration is required.

We must note, however, as the bank points out, that there is dictum in the Red Cross opinion which supports its contention on this appeal. Thus the court wrote (p. 360): 'In those respects in which the Red Cross differs from the usual government agency—*e.g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e.g.*, national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.'

If the Supreme Court had dealt with the precise problem with which we are concerned here—namely the status of national banks—we would, of course, follow that decision without question. We believe that the court's reference to national banks is clearly understandable in the context in which it was rendered, since the precedents cited and discussed earlier have never been rejected and the status of national banks as tax-immune instrumentalities was not disputed in that case. It is obvious, however, that the *reasoning* of the court's decision and its holding squarely support the position we take here and the similar position recently taken by the Supreme Judicial Court of Massachusetts (*First Agric. Nat. Bank of Berkshire County* v. *State Tax Comm.*, 229 N. E. 2d 245 [Mass., 1967]). Until the Supreme Court holds that *national banks of today* are to be deemed immune from contributing their fair share of the taxes necessary to enable State and local

> governments to provide the essential services from which the banks themselves benefit, we decline to do so.
>
> We, of course, recognize that, even though the bank is not automatically entitled to a constitutional immunity from taxation, Congress has the power to immunize national banks and other federally chartered institutions from this type of taxation. There is, however, no such statute presently in effect."

We submit that if the dictum in the *Red Cross* opinion, *supra,* concerning tax immunity has any relevance to the precise issue here this dictum must be construed, as we contend and demonstrate herein, solely in reference to the *other* taxes mentioned in § 548, *supra,* and certainly not to State sales taxes which are otherwise permitted by the Federal Constitution and which never have been denied to the States by a specific act of Congress. We further submit that the *Red Cross* opinion, *supra,* must be construed with the one rendered the same date by this Court in *First National Bank* v. *Walker Bank,* 385 U. S. 252, in which the *McCulloch* case was also cited, to show that the original Bank of the United States was, as it then existed, a "true" federal instrumentality. The *Walker Bank* case, *supra,* of course, was concerned solely with Congressional regulatory power over branch banking of national banks, an area in which Congress has pre-emptive jurisdiction for purposes of regulation. As shown herein, this is an entirely different matter from that of taxation.

III. National banks have no statutory immunity from non-discriminatory sales taxation.

Section 548 of U. S. C. A., *supra,* is not the sole measure for taxing national banks. All that can be said about appellant's legislative history of this section is that Congress has deemed it unnecessary to amend it. It is very clear that the specific provisions of § 548 do not prohibit

states from imposing a sales or use tax which may be paid by national banks. While the statute expressly mentions four specified types of taxes (on shares, on dividends, on income of the bank, and taxes "measured by" the income of the bank) and does not mention sales or use taxes, it very definitely does not provide that these four are the *only* permissible kinds of taxes to the exclusion of all others, as we have already shown. Subdivision 1 of Section 548 merely provides that "the imposition by any State of any one of the above forms of taxation shall be *in lieu of the others*" therein enumerated (emphasis added). This addition was made in 1923 (42 Stat. 1499; Public Law No. 518, Ch. 267), as its legislative history shows, solely for the purposes of extending the competitive equality concept contained in the National Banking Act (see *Senate Reports*, Vol. I, Rept. No. 986, 67th Cong. 1922-1923, pp. 1-4. *House Reports*, Vol. III, Rept. No. 1078, 67th Cong., 1922-1923, pp. 1-2). This addition was to prevent a national bank or its shareholders from being subjected to more than one of *the four* enumerated types of taxes, other than real property taxes, so as to avoid multiple taxation of the same income. Subdivision 1(a) of § 548 uses the phrase "the others", thus clearly referring to the *other* enumerated types of taxes. It does not provide nor mean, as appellant would have it, that the imposition of any one of these four forms of taxes shall be in lieu of all *other different* taxes, such as a non-discriminatory sales tax. This was never the Congressional intent, nor has it ever been so construed by this Court.

Appellant argues that Congress, by mentioning some form of taxation in § 548, *supra*, intended to prohibit *all* other forms of taxation. This contention is wholly without merit, especially in this field. Immunity cannot be derived from statutes by implication. This has long since

been disposed of by this Court. What was said, for example, as to the claimed immunity of "restricted" Indian lands from state taxation applies here: "The immunity formerly said to rest on constitutional implication cannot be resurrected in the form of statutory implication" (*Oklahoma Tax Comm.* v. *United States,* 319 U. S. 598, 604 [1942]). There this Court found that there was "not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities * * *" from taxation, and accordingly (*ibid.,* p. 604):

> "We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act." (To the same effect see *Oklahoma Tax Comm.* v. *Texas Co.,* 336 U. S. 342, 365 [1948].)

That is the precise situation here. Exemption from taxation must be expressly provided and cannot rest upon implication (*United States Trust Co.* v. *Helvering,* 307 U. S. 57, 69 [1939]), since, in the immunity area exemption is the exception, not the rule and the statute requires "much clearer language evidencing an intent to immunize * * * under these circumstances" (*Smith* v. *Davis,* 323 U. S. 111, 117 [1944]). In this area especially (*Oklahoma Tax Comm.* v. *Texas Co., supra,* 336 U. S. 342, 365-366 [1948]):

> "* * * The question whether immunity shall be extended in situations like these is essentially legislative in character. But Congress has not created an immunity here by *affirmative action,* and 'The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.' *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 604. And see *Graves* v. *New*

> *York ex rel. O'Keefe,* 306 U. S. 466, 480: "* * * if it appears that there is no grounds for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity'." (Emphasis added.)

This is but another way of saying that "Silence of Congress implies immunity no more than does silence of the Constitution * * * and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity" (*Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 480 [1938], *cf. Mayo* v. *United States,* 319 U. S. 441, 447-448 [1942]).

We, therefore, submit that there is no merit to appellant's contention that § 548, *supra,* has not been amended by Congress in the sales and use tax area here involved. Since the implied immunity doctrine is judicial in origin and development, the Congress has *wisely* left the construction and application of § 548 to the courts, as in the present case, as well as in the case decided by the New York Court of Appeals, *Liberty National Bank, supra,* Appendix B, pp. 73-74 (*cf., e.g., National Bank of Detroit* v. *Department of Revenue,* 340 Mich. 573, 66 N. W. 2d 237 [1955], app. dism. for want of a substantial Federal question, 349 U. S. 934). Nor is there any merit to appellant's specious contention that in this case the Massachusetts decision below was "judicial legislation in the guise of judicial construction" (Br., p. 22). This is merely the usual unfounded conclusion often made when a decision is adverse; understandably, "adversity is not without comforts and hopes." Accordingly, absolutely no *need* exists in the present area for an amendment to

§ 548. It is for this precise reason that appellant's reliance upon Congressional inaction concerning the 1950 Senate Bill, S. 2547, is wholely misplaced and of no consequence. Indeed, the very Subcommittee hearings on this bill disclose that its Chairman noted this by saying that the *McCulloch* case, *supra,* was one "involving an effort to tax the Bank of the United States by the State of Maryland in such a way that the Bank *could not have successfully operated*" (emphasis added). The Federal Government did not *oppose* this bill, in any event (*Hearing Before a Subcommittee of the Committee on Banking and Currency,* United States Senate, Eighty-First Congress, Second Session on S. 2547, pp. 2-4). Of course, these sales taxes now involved in no way imperil any banking *functions* or *operation*—they are purely upon *private* retail transactions (see also pp. 14, 19, 49, 52-55 herein).

In sharp contrast to the Congressional silence with respect to sales and use taxation of national banks, the Congress has taken affirmative action elsewhere to either expressly permit or to prohibit this kind of taxation on many occasions with respect to its own property, and/or its *own* instrumentalities" or "agencies of the United States" in the Acts creating them. Indeed, for example, when reporting on the taxable status of the Federal Limited Profit Mortgage Corporation, created under the National Housing Act of 1961, the Senate Committee on Banking and Currency reported (1961 *U. S. Code Cong. and Admin. News,* Vol. 2, pp. 2006-2007):

> "* * * This compilation lists 15 Federal statutes affecting corporations, financial institutions, or agencies of the Federal Government with tax exemption provisions. Thus, it would appear that the tax exemption provisions in S. 1342 are not unusual. This compilation is as follows:

1. Federal Reserve banks (12 U. S. C. 531).
2. Federal land banks (12 U. S. C. 931).
3. Federal Farm Mortgage Corporation (12 U. S. C. 1020f).
4. Federal Intermediate Credit Bank (12 U. S. C. 1111).
5. Central Bank for Cooperatives, Production Credit Association, banks for cooperatives (12 U. S. C. 1138c).
6. Federal home loan bank (12 U. S. C. 1433).
7. Federal savings and loan associations (12 U. S. C. 1464).
8. Federal National Mortgage Association (12 U. S. C. 1716).
9. Federal Savings and Loan Insurance Corporation (12 U. S. C. 1725).
10. Federal housing, certain debentures (12 U. S. C. 1747g).
11. Federal Deposit Insurance Corporation (12 U. S. C. 1825).
12. Reconstruction Finance Corporation (certain securities) (12 U. S. C. 607).
13. Commodity Credit Corporation (12 U. S. C. 713a-5).
14. Standard for Government securities generally (31 U. S. C. 868).
15. Public Housing Administration (42 U. S. C. 1405[e])."

National banks, of course, are not included as tax exempt. Where Congress has intended to grant immunization from all forms of state taxation, it has always done so in clear and unambiguous language. Thus, for example, when Congress desired to exempt Federal land banks from all state taxation, except real estate taxes, it provided:

"Every Federal land bank * * *, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal and local taxation, except taxes, upon real estate held, * * * by said bank * * *" (12 U. S. C. § 931).

It did the same thing for the Federal Deposit Insurance Corporation where it used the same language (Title 12 U. S. C. A., § 1825). Indeed, the Banks and Banking Acts of the United States (Title 12, *supra*) are replete with similar provisions specifically dealing with the taxable status of Federal instrumentalities of the United States created by Congress (see *e.g.* the above itemized list).[14] Moreover, Congressional intent for total exemption from any kind of tax is revealed by the deliberate choice in the statute of the phrase "all taxation" in order to accomplish that result, thereby eliminating sales and use taxes, otherwise permissible.

And, too, when Congress determined that the Reconstruction Finance Corporation should be exempt from all state taxes (except those on real estate) it explicitly provided:

"The Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality or local taxing authority. * * * The exemptions provided for in the preceding sentence with respect to taxation (*which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes*) * * *" (15 U. S. C. § 607, emphasis added).

In fact, when the purposes and functions of governmental lending agencies are compared with those of national banks, it is understandable why Congress immunized the land

[14] National banks, in contrast, voluntarily come into being under enabling legislation (Title 12, *supra*, §§ 21 *et seq.*).

banks and the RFC from certain kinds of taxation, but not national banks. Federal Land Banks are cooperative farm credit associations designed to furnish credit to farmers at the lowest possible costs.[15] Borrowers from land banks must be stockholders; thus, the profits of the land bank are returned to the borrower-stockholder, effectively reducing the interest costs (see *Federal Land Bank* v. *Kiowa County,* 368 U. S. 146 [1961]; *cf. Federal Land Bank* v. *Bismark,* 314 U. S. 95 [1951]). Similarly organized as cooperative organizations to provide low cost credit to its members are the Federal Credit Unions which also have been immunized from state taxation (Title 12, *supra,* §§ 1752, 1768).

As for the Reconstruction Finance Corporation, all of its capital stock, of course, was owned by the Federal Government, its directors were appointed by the President, and its profits belonged to the Government. The purpose of the Reconstruction Finance Corporation was to extend loans and financing to distressed agricultural, commercial and financial institutions.

To enable the land banks and the RFC, for example, to fulfill their purposes better, Congress intended that their costs be kept as low as possible. Therefore, Congress in its discretion, specifically immunized these agencies from both Federal and State taxes.

By contrast, there could be no Congressional intent to reduce the costs of national banks, for to do so would benefit *only* its shareholders, not the national treasury or the bank's customers. Thus, where there are compelling considerations, Congress has explicitly exempted its Federal lending institutions from all taxes. Those considerations

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[15] The charges on mortgage loans are rigidly set to assure the lowest cost to the borrowers (12 U. S. C. § 771 ¶ Second).

are totally absent with respect to national banks, and there is no basis, therefore, for implying a sales tax exemption for them.

In sharp contrast, however, it is *only* when a *closed* national bank has been reorganized, that Congress, in a separate statutory provision, § 1821 of Title 12, has specifically granted total immunity to the new bank from *all* taxation, state and federal, despite the existence of § 548 of Title 12. Section 1821(i), *supra*, provides as follows:

> "Notwithstanding any other provision of law the new bank, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority."

Section 7507 of the Internal Revenue Code exempts insolvent or bankrupt national banks from taxes imposed by such code.

We submit that §§ 548 and 1821(i), *supra*, are *in pari materia* and must be construed together. (*Michigan National Bank* v. *Michigan, supra*, 365 U. S. 467, 481 [1960]). This clearly discloses the intent of Congress not to immunize an existing national bank from State and local sales and use taxes, otherwise § 548 would have been amended so as to effectuate the total immunity afforded by § 1821(i) to reorganized national banks. The immunity of closed banks from taxation serves the purpose of providing additional funds to the depositors, thus reducing the losses sustained.

Meanwhile, and in continued contrast, however, Congress has *waived* governmental immunity for certain true Federal instrumentalities in recognition that they, too, must support the cost of local government so as to permit the imposition of non-discriminatory sales taxes which otherwise

would be prohibited under the immunity doctrine. For example, Congress has permitted sales and use taxes upon Atomic Energy project contractors as the direct result of the decision in *Carson* v. *Roane-Anderson Co.* (342 U. S. 232 [1951]), by amending the Atomic Energy Act of 1946 (see *U. S. Senate Report* No. 694, pp. 1-8; Vol. III, *Senate Misc. Reports*, 83rd Cong., 1st Sess. and *cf. United States* v. *Boyd*, 378 U. S. 39 [1963]). Similarly, with respect to permissive state taxes which may be imposed in Federal areas, immunity also has been waived (4 U. S. C. A. §§ 105-107; *Offutt Housing Co.* v. *Sarpy Co.*, 351 U. S. 253, 257 [1957]; *Polar Co.* v. *Andrews*, 375 U. S. 361 [1963]; *Humble Pipe Co.* v. *Waggerner*, 376 U. S. 369 [1963]).

In comparison, national banks, however, which are privately owned and operated for profit, stand upon entirely different footings and no longer fall under, nor need the protective shield of the immunity doctrine. Consequently, we submit, there exists neither need, reason, nor justification for any corresponding Congressional waiver for them. Indeed, even as to the Federal government itself, the United States possesses "no constitutional immunity" from these taxes when they are imposed upon "private parties" even though "part or all of the financial burden of the taxes eventually falls on the Government" (*United States* v. *City of Detroit, supra*, 355 U. S. 456, 469). Of course, national banks are *private parties* within this concept in the first place, and, secondly, no financial burden is ever passed on to or sustained by the Government. Since Congress has not immunized national banks from these sales taxes, they may be imposed upon retail transactions entered into by national banks.

A fair construction of § 548 of the National Bank Act mandates its liberal and pragmatic application. Its pur-

pose is not to permit some forms of taxation by the states upon national banks and to *prohibit* all others. It deals *solely* with the taxation of shares, income and real property of national banks, as therein provided. It has always been an express Congressional recognition of the need for competive tax equality between national and State banks, as its entire history clearly shows. It merely provides basic standards to assure that a State's tax system does not impose double taxation on national banks and its stockholders, or discriminate against national banks, so as to require tax equality between national banks and State banks. The intent of § 548 is to prohibit *only* those taxes which discriminate against national banks (see *e.g., Michigan National Bank* v. *Michigan,* 365 U. S. 467 [1961]; *Tradesmens Bank* v. *Tax Comm.,* 309 U. S. 560, 567 [1939]).[16]

The provisions of § 548, *supra*, are designed and intended *solely* to prevent states from imposing higher rates of tax on national banks than are imposed on other corporations with which such banks compete, and to prevent the double taxation that would result if, for example, the income of a national bank and the shares held by its stock-

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[16] Of course, too, New York State has always been mindful of a policy of tax equality for state and national banks. It has been a constitutional policy of this State since the 1938 State Constitutional Convention, and the adoption of Article 16, § 4 to the State Constitution. This section provides:

> "Where the State has power to tax corporations incorporated under the laws of the United States there shall be no discrimination in the rates and method of taxation between such corporations and other corporations exercising similar functions and engaged in substantially similar business within the state."

This was designed to protect State and national banks (see *Revised Record, New York State Constitutional Convention,* 1938, Vol. II, pp. 1125-1138, Vol. III, pp. 2453-2461; *1938 Journal and Documents,* Doc. No. 2, p. 4; *Bank of Manhattan Co.* v. *Murphy,* 293 N. Y. 515 [1944]).

holders were both taxed (see *Mercantile National Bank* v. *New York*, 121 U. S. 120 [1886]; *Michigan National Bank* v. *Michigan*, 365 U. S. 467 [1961]).

Thus, in the *Mercantile National Bank* opinion, *supra*, this Court pointed out that unequal taxation of national banks would inhibit investments to the detriment of the national banks located therein, and found (121 U. S., at p. 155):

> "The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals and operations and investment of a like character. The language of the Act of Congress is to be read in the light of this policy."

In *Michigan National Bank* v. *Michigan*, *supra*, this Court's most recent case on the subject of taxation of national banks, it was stated (365 U. S. at pp. 476-477):

> "We believe that, granted satisfaction of the other qualifications of § 5219, a State's tax system offends only if in practical operation it discriminates against national banks or their shareholders as a class. That is to say, we could not strike down Act No. 9, as interpreted by Michigan's highest court, unless it were manifest that an investment in national bank shares was placed at a disadvantage by the practical operation of the State's law. According to our cases, discussed above, that clearly appears to have been the purpose of the Congress in enacting § 5219."

Nothing in this historical and well established policy of preventing discrimination against national banks is inconsistent with the imposition of a non-discriminatory sales or use tax which ultimately may be paid by them.

This is made perfectly clear by this Court's decisions, as well as by Congress, as demonstrated. The *McCulloch* case must be confined solely to its specific factual and legal circumstances which gave rise to the precise reason for the immunity doctrine. As the opinion clearly shows, and as later stated by this Court, that decision was one "in which it was held that a state tax laid *specifically upon the privilege of issuing bank notes* and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, implied as an incident to the borrowing, taxing, war and other powers specifically granted to the national government by Article I § 8 of the Constitution" (*Helvering* v. *Gerhardt*, 304 U. S. 405, 411 [1938], emphasis added). It was solely for this reason that the tax was struck down, *ibid.*, p. 411. This is certainly not the situation today, especially with respect to the sales taxes here involved, since no burden is imposed whatsoever upon the national government. Moreover, neither do these taxes, "infringe the national banking laws or impose an undue burden on the performance of the bank's functions" which is necessary to strike down state laws applicable to national banks (See *e.g.*, *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 247-248 [1943]). There this Court specifically noted that the statute "does not *discriminate* against national banks, *cf.*, *McCulloch* v. *Maryland*, 4 Wheat., 316 * * *" (*ibid.*, p. 247, emphasis added). Later this Court, citing the *McCulloch* decision, stated "* * * a State cannot levy a tax directly against the United States or its property without the consent of Congress" (*United States* v. *City of Detroit*, *supra*, 355 U. S. 466, 469 [1957]). The sales taxes here involved make no such attempt at all.

The restrictive application of the *McCulloch* doctrine of implied immunity was long ago illustrated in the construc-

tion of the National Bank Act of 1864, where the Supreme Court stated (*National Bank* v. *Commonwealth*, 76 U. S. 353, 361 [1869]):

> "But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation."

and then stated (*ibid.*, p. 362):

> "It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

These principles have been consistently adhered to (see, *e.g.*, *Hibernian Savings Society* v. *San Francisco*, 200 U. S. 310, 314-315 [1905]; *First National Bank* v. *Missouri*, 263 U. S. 640, 656 [1923]; and cases cited; *Lewis* v. *Fidelity Co.*, 292 U. S. 559, 566 [1933]). In other words, at this time and place, where the power to tax is *not* the power to destroy, it is permissible (see, *e.g.*, *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, *supra* [1938]), and there can be "* * * no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property" (*City of Detroit* v. *Murray Corp.*, *supra*, 355 U. S. 489, 495 [1957]), nor do the New York statutes, as this Court said again, in a case decided December 5, 1967 "* * * retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." (*Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 240 [1967].) Nor can there be any such effect upon this appellant either.

Indeed, quite the contrary has occurred. The record is completely devoid of any showing, and none can be established, that appellant's banking operations would be in any way impaired, let alone destroyed, by the imposition of the taxes here involved.

As to Liberty National Bank, between December 31, 1962 and December 31, 1966, for example, it had tremendous business growth despite the imposition of New York taxes, as disclosed by the following tabulation:[17]

	Total Assets (In Millions of Dollars)	*Offices*
12/31/62	$250.6	27
6/30/63	273.7	30
12/31/63	287.3	31
12/31/64	338.8	32
6/30/65	365.4	33
12/31/65	378.5	34
12/31/66	408.3	34

Since sales and use taxes did not exist as revenue measures at the time the National Bank Act was enacted in 1864, or even at the time of its most recent amendment in 1926 (*supra*), it is unreasonable and wholly unjustified to assume that Congress intended to prohibit such taxes, at least when they are imposed in a non-discriminatory manner on purchases made by national banks. It is only since the early 1930's that such taxes have become significant factors in State tax structures (see, *e.g., State Taxation of Interstate Commerce,* 89th Cong. 1st Sess. H. Rpt. No. 565, p. 608). No state had adopted a sales tax earlier than 1932 (*ibid.,* Table 19-1, p. 610). The New York State sales tax with which we are concerned was adopted in 1965 (Ch. 93); the Erie County Sales and Use Tax was adopted in 1947;

[17] Sources: Rand McNally Bankers' Directory; New York Federal Reserve Bank; New York State Banking Department Annual Reports for the period covered.

and the New York City Sales and Use Tax in 1934 (Local Law, No. 25).

We have found no case where this Court has ever struck down non-discriminatory sales taxes payable by national banks of the kind present here imposed upon their own *private retail business transactions*, as distinguished from other kinds of taxes imposed *directly* **upon such banks or** their banking functions, an entirely different matter. Equally important, too, neither have such taxes ever been prohibited by Congress, although it has done so with its own agencies and fiscal institutions, as shown, *supra*. Quite the contrary, all of the reported cases, which we have examined and analyzed, have dealt with various taxes imposed pursuant to 12 U. S. C. A. § 548 (15 Stat. 34, R. S. § 5219 of the Revised Statutes, as amended) at the time of their enactment. Upon their review this Court either approved them or condemned them. That is why, we submit, this Court has stated, as it has often done in a generalized way in respect *solely as to these distinguishable taxes:* "There can be no taxation of the banks, their property or their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation" (*i.e.*, by § 548, *supra*). This is made perfectly clear from the very cases where this quoted language appears, *viz. Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 106 (1923), (citing several earlier cases to the same effect, including *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664 [1899]); *First National Bank* v. *Anderson*, 269 U. S. 341, 347 (1925); and *Michigan Nat. Bank* v. *Michigan*, 365 U. S. 467, 473 (1960). Others, of course, could have been cited, too, such as *Tradesmens Bank* v. *Tax Comm.*, 309 U. S. 560 (1939), the last tax case reviewed by this Court prior to the *Michigan National Bank* case, *supra*. Consequently, all of these cases con-

struing § 548, *supra,* must be confined solely to those taxes specified therein—*not to sales taxes.*

The same is true, of course, as we have said earlier, with respect to the case of *Bank of California* v. *Richardson,* 248 U. S. 476 [1918] and as to the others which are also erroneously relied upon by the appellant.

As shown, § 548 is a *permissive* statute not a prohibitive one as to sales taxes which in no way impair any banking function, as do the taxes specified in § 548. This conclusion is certainly not affected by the opinion in *Colorado Nat. Bank* v. *Bedford,* 310 U. S. 41 (1939) also erroneously relied upon by the appellant. The opinion in the *Colorado Bank* case, *supra,* is merely a logical extension of the rationale quoted above. This is patent in the opinion and by the citation therein of the *Owensboro* and *First National Bank* cases, *supra.* This Court observed as to § 548 (§ 5219), after discussing the operation of safe deposits as a permissible banking function of national banks and a state tax imposed and collected from the safe depositors, that (*ibid.,* pp. 50-51):

> "(3) We may assume, as did the Supreme Court of Colorado, that the tax is invalid if laid upon the bank as an instrumentality of government in the incidents referred to in the proceeding section; that its banking operations are free from state taxation except as Congress may permit, that Congress permits the taxation only of shares and real estate, and that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness."

From this it is perfectly clear that the observation certainly does not apply to the situation here. The taxes imposed here are solely on the *retail transaction,* not upon the bank (see *e.g. United States* v. *City of Detroit, supra,* 355 U. S. 466, 470-471; *Young & Co. of Austin* v. *Calvert,* 405 S. W. 2d 174 [1966], cert. den. 386 U. S. 914 Feb. 13 [1967]).

The fiscal needs of the States compel a full re-examination of the immunity doctrine in the light of present-day tax measures so necessary to *offset* rising costs of government.[18] We submit that nondiscriminatory sales and use taxes must be *equated* with real property taxes because they fall into the same general category serving the same purpose. The latter have never been prohibited since the decision in *McCulloch* v. *Maryland, supra,* 17 U. S. 316, where it was conceded that the Bank was subject to real property taxation for the support of government, and where it was said, at p. 435:

> "This opinion does not deprive the states of any resources which they originally possessed. *It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state,* nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." (Emphasis added.)

This is why real property taxation is not prohibited by § 548, subd. 3, *supra.* Of course, at the time of the *McCulloch* decision there was no Federal statute dealing with the taxation of banks. Consequently, this Court had to judicially immunize the Bank of the United States by (1) formulating the implied immunity doctrine in order to strike down the tax there involved, and (2) having done so, it then had to take real property taxes outside of this doctrine as a right preserved to the States and still retained and which would be, even in the absence of § 548, subd. 3, in any event.

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[18] As a matter of fact, it was for this very reason, as the Congressional debates show, that Congress permitted the taxation of the national banks in 1864 in order that State taxes "Shall be paid to support the State governments, the city governments, and county governments, the local municipal corporations of the different States" (See *e.g., Cong. Globe,* 38th Cong., 1st Sess., *supra,* Vol. 34, Part 2, p. 1897).

Since needed revenue can no longer be obtained by increased real property taxes, additional sources of revenue had to be found. Indeed, it was because of the financial burden upon real property that specific limitations upon its taxation are presently contained in the New York State Constitution (Article VIII, § 10; see also *Problems Relating to Taxation and Finance*, 1938 Constitutional Convention Committee, Vol. X, p. 253). The entire history of retail sales taxation in New York State, both State and local, clearly shows that they have been enacted in lieu of real property taxes and as a direct result of the fact that real property could no longer sustain this burden. Chapter 726 of the Laws of 1930 created the New York State Commission for the Revision of the Tax Laws to recommend legislation to "relieve present sources of revenue, *particularly real estate* which now bears a disproportionate part of the whole tax burden of the State." (§ 1, Emphasis added.) As the result, the first State sales tax was enacted by Laws of 1933, Ch. 281, and 25% of its yield was to be apportioned among the localities. While Ch. 281, *supra*, expired by its terms in 1934, New York City was empowered by Laws of 1934, Ch. 873 to enact local sales tax legislation, and New York City Local Law No. 25 was enacted (*Local Laws of Cities and State*, pp. 164-175, now title M & N of Chapter 46 of the New York City Administrative Code). During the 1940's, it was again found that real property taxation no longer could meet the *rising costs* of government, and, in fact, a reduction of property taxation was needed (see Governor Dewey's Message to the Legislature in 1946, *Public Papers of Governor Dewey*, 1946, pp. 32-35). As a result of the 1945 and 1946 *Reports of the Commission on Municipal Revenues and Reductions of Real Estate Taxes*, Governor Dewey, in 1947, recommended granting additional taxing powers, including retail sales taxes to cities and counties (*Public Papers of Governor*

Dewey, 1947, pp. 171-175). This resulted in the enactment of Laws of 1947, Ch. 278, authorizing counties and New York City to impose retail sales taxes, and eventually other enabling legislation permitted other cities to impose retail sales taxes (Laws of 1948, Chs. 489, 651; Laws of 1949, Chs. 454, 806; Laws of 1950, Chs. 589, 590). Generally the proceeds under this enabling legislation were to be used for educational purposes, and in the case of the City of New York, for any city purpose. Approximately 80% of the revenues presently derived from the State-wide sales tax, are returned to the localities (Laws of 1965, Ch. 83).

It was for the very reason to relieve the local real property tax in the District of Columbia that Congress enacted the District of Columbia Sales and Compensating Use Tax by Public Law No. 76, 1949, ch. 146, vol. 63, p. 112 *et seq.,* as amended, (see *U. S. Cong. Service* 1949, vol. 2, p. 1297 *et seq.*), and which specifically imposes such tax upon national banks by Title XIII, § 47—2605 thereof.

Nondiscriminatory sales taxes, imposed upon the *retail transaction,* inflict no more financial burden upon national banks than do real property taxes. Each is for the general support of government and each is merely an incident in the cost of doing a *private* banking business, a legitimate price to pay, as it is for their State bank competitors. Economic preference to escape the fair share of local taxation is no longer sanctioned under the immunity doctrine (*United States* v. *City of Detroit, supra,* 355 U. S. 466, 473). To this extent, therefore, sales taxes merely enter into the cost of such business as any other cost, affecting only the shareholders by a reduction in ultimate earnings or profits otherwise available to them. But this same result also occurs, of course, with real property taxes just as it also does with an income or franchise tax imposed upon the bank of the kind contemplated by § 548, *supra.*

Therefore the construction of § 548, *supra,* must be a pragmatic one, in view of the "entire tax structure of the State as a whole", and not merely as to the specific taxes here involved (see, *e.g., Security-First National Bank* v. *Franchise Tax Board,* 359 P. 2d 625, 628 [1961], [citing *Tradesmens Bank* v. *Tax Commission,* 309 U. S. 560, 567-568], app. dism. and cert. den. 368 U. S. 3; *Phillips Co.* v. *Dumas School District,* 361 U. S. 376, 383 [1959]). Consequently, as we have shown, the sales taxes here involved were enacted in lieu of and equivalent with real property taxes, which are no longer adequate for revenue purposes. Should this Court immunize national banks from sales taxation, then their real property taxes might have to be increased to offset this loss. Additionally, their preferential franchise tax treatment, presently accorded to national banks by New York Tax Law, Article 9-C, § 219-rr, over business corporations which are taxable by New York Tax Law, Article 9-A, might have to be eliminated by the Legislature, as well. This latter eventuality has, in fact, occurred in California (see *Security-First National Bank* v. *Franchise Tax Board, supra*). National banks presently are taxed in New York State on their franchise at a rate which is 1% less than 9-A business corporations, even though the latter are subject to the sales taxes, too (see L. 1953, c. 308; 1953 *Legis. Annual,* pp. 299-300; 1952-1953 Annual Report of the State Tax Commission, 1953 *Leg. Doc.,* No. 99, pp. 45-46, 47-48).

Finally, there is no merit to any possible contention that national banks fall within the meaning of New York Tax Law, § 1116 as an exempt organization therein defined. That section merely provides immunity to "United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation * * *". This is merely a statutory recognition of the implied immunity

doctrine borrowed from earlier provisions of past legislation, as well as from similar language in other articles of the Tax Law. It is really not needed if that doctrine applies, since the doctrine stems from the Constitution of the United States, but as we have clearly shown, national banks are no longer entitled to this constitutional immunity.

CONCLUSION

National banks are not entitled to implied constitutional or statutory immunity from State and Local Sales and Use taxation, and the appeal should be dismissed for want of a substantial federal question.

Dated: March 25, 1968.

Respectfully submitted,

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APPENDICES

Appendix A

"NATIONAL BANK SHARES

§ 548. State Taxation

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall *be in lieu of the others,* except as hereinafter provided. * * *

(b) In the case of a tax on said shares the tax unpaid shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks. * * *

(c) In case of a tax on or according to or measured by the net income of an association. * * * the rate shall not be higher than the rate assessed upon other financial corporations. * * *

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

* * *

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value as other real property is taxed (Emphasis added).

* * *"

Appendix B

Liberty National Bank and Trust Company, Respondent, v. William K. Buscaglia, as Director of the Division of Sales Tax, County of Erie, *et al.*, Appellants.

Decided December 29, 1967.

Appeals, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 17, 1966, in a proceeding under CPLR article 78 (submitted pursuant to CPLR 3222 upon an agreed statement of facts, and transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Erie County), which (1) adjudged that State and county sales and use taxes could not lawfully be imposed on receipts from sales and services made or rendered to petitioner national bank, and (2) directed respondent Director of the Erie County Sales Tax Division to refund the amount of such taxes collected from petitioner bank.

Louis J. Lefkowitz, Attorney-General (Robert W. Bush and *Ruth Kessler Toch* of counsel), for appellants.

Alan H. Vogt, William D. Schulz and *John J. LaFalce* for respondent.

Keating, J. The question presented for our consideration is whether the Liberty National Bank and Trust

Company is an instrumentality of the United States Government and, therefore, as a purchaser, is immune from sales and use taxes imposed by the State of New York and the County of Erie.

There is no dispute with regard to the applicable constitutional law—the rule is clear that the Government of the United States, its agencies and instrumentalities may not be subjected to taxation by State and local governments, absent congressional consent. (See, e.g., *Department of Employment v. United States*, 385 U. S. 355.) The question merely is whether a national bank is an instrumentality of the Federal Government. The bank, in support of its tax-immune status, cites a long line of cases holding that a national bank is an instrumentality of the Federal Government (See, e.g., *M'Culloch v. Maryland*, 4 Wheat. [17 U. S.] 316; *Osborn v. Bank of United States*, 9 Wheat. [22 U. S.] 738; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664). We must keep in mind, however, in reviewing these cases, that what must be determined here is in essence a question of fact—"whether [the] institution is so closely related to governmental activity as to become a tax-immune instrumentality" (*Department of Employment v. United States*, 385 U. S. 355, 358-359, *supra*).

The cases which have held that national banks are instrumentalities of the Federal Government go back almost to the beginning of our republic and involve institutions whose activities are so different and varied that their value as precedent is open to serious question. As Mr. Justice Brandeis has written in a dissenting opinion which has since been adopted by the Supreme Court. "[T]he decision of the Court, if, in essence, merely the determination of a fact, is not entitled, in later controversies be-

tween other parties, to that sanction which, under the policy of *stare decisis,* is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. * * * Moreover, the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned. In cases involving constitutional issues of the [kind presented here], this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may * * * 'depend altogether on the force of the reasoning by which it is supported'" *(Burnet v. Coronado Oil & Gas Co.,* 285 U. S. 392, 412-413[1]; see, also, *Smith v. Allwright,* 321 U. S. 649, 656).

The leading case in this area and a landmark decision in American jurisprudence is *M'Culloch v. Maryland* (*supra*). It was in this case that the Supreme Court upheld the power of Congress to charter a national bank and, in addition, held that the bank thus created was subject to immunity from taxation "on [its] operations" (4 Wheat. [17 U. S.] 436).

The national bank involved in *M'Culloch v. Maryland* (*supra*) and *Osborn v. Bank of United States* (*supra*) was one in which the Federal Government subscribed to and owned 20% of the capital stock. The President of the United States had the power to appoint 5 of the 25 members

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[1] The majority opinion from which Mr. Justice BRANDEIS dissented as well as the precedent which he would have no longer followed were overruled in *Helvering v. Producers Corp.* (303 U. S. 376, 387). The issue in those cases involved a question of the amenability of government instrumentalities to taxation. The court ultimately determined that leases of State-owned property—contrary to prior decision—were not instrumentalities of the State.

of the Board of Directors and the Government participated in the election of the remaining directors. The Secretary of the Treasury was required to deposit all Federal moneys in the bank and the bank was required to transmit funds for the Federal Government without charge. Moreover, paper currency *issued by the bank* was made legal tender for the purpose of paying all debts owing to the Federal Government, and the bank acted as a fiscal agent for the United States and handled its foreign exchange transactions (see, generally, Studenski and Kroos, Financial History of the United States [1952], pp. 83-88, 103-106). It was in this context that Chief Justice MARSHALL noted that the bank was "the great instrumentality by which the fiscal operations of the government are effected" (*Osborn v. United States,* 9 Wheat. [22 U. S.] 738, 860, *supra*), and was thus immune from discriminatory taxes which hostile State governments sought to levy.[2]

In striking down these taxes which were designed to destroy and hamper an institution which was clearly an instrumentality of the national Government, Chief Justice MARSHALL wrote in *M'Culloch v. Maryland* (*supra*, pp. 436-437): "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and

[2] In *M'Culloch v. Maryland (supra)* the State sought to tax the currency issued by the national bank—a tax on the very performance of a governmental function and in *Osborn* the State imposed a $50,000 tax on each office. In both instances the tax was blatantly discriminatory as no similar tax was imposed on State banks.

is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

The charter of the national bank with which *M'Culloch* and *Osborn* dealt expired in 1836—no such bank with similar functions has been chartered by Congress since that period. The next major congressional action with regard to national banks came during the Civil War period with the enactment of the National Bank Acts of 1863-1864. While the relationships of national banks to the government under the statute was not as close as that of the earlier Bank of America, they, nevertheless, were actively engaged in the governmental function of issuing notes which served as the Nation's currency. It was this national bank system which the Supreme Court dealt with in *Owensboro Nat. Bank v. Owensboro* (173 U. S. 664, *supra*). In that case the court struck down a tax on the intangible property of a national bank—a tax which was also allegedly discriminatory in some respects (*supra*, p. 665).

In *Owensboro* and subsequent cases which have followed, the court has continued to rely on *M'Culloch v. Maryland* and *Osborn v. United States* without undertaking *de novo* examinations of the functions of the bank in each instance. (See *e.g. First Nat. Bank v. Anderson*, 269 U. S. 341 [1926]; *First Nat. Bank v. Hartford*, 273 U. S. 548 [1927]; *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239 [1931]; *Colorado Nat. Bank v. Bedford*, 310 U. S. 41 [1940]; see, also, *People ex rel. Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88 [1908]; *People ex rel. Hanover Nat. Bank v. Goldfogle*, 234 N. Y. 345 [1922].) While such reliance may have been justified during the period when national

banks continued to issue currency—a function which terminated in 1935, we believe the time has come when the tax-immune status of national banks must be re-examined in light of both their present day function as well as other Supreme Court decisions which have set forth criteria for making determinations similar to that which we are required to make here.

An examination of the Supreme Court's decisions in this area reveals a general curtailment of the class of instrumentalities which are viewed as tax immune. The court appears to be placing greater stress upon the nature of the tax and its actual effect upon the furtherance of the governmental functions involved rather than relying upon a "mechanical applicaion of the rule that government instrumentalities are immune from taxation" (*Educational Films Corp. v. Ward*, 282 U. S. 379, 391-392.)[3]

The earliest and most significant of these decisions is *Railroad Co. v. Peniston* (18 Wall. [85 U. S.] 5 [1873]). In that case the *Union Pacific Railroad Company, a corporation chartered by Congress, challenged* a tax laid upon its property by a subdivision of the State of Nebraska. The Supreme Court proceeded first to consider the arguments advanced in support of the railroad's argument that it was an instrumentality of the United States to the extent that it was entitled to the same tax immunity as the government itself:

"It is insisted on behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the General government constituted and organized as an in-

[3] "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of one government correspondingly curtails the sovereign power of the other to tax." (*Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483.)

strument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to State taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the National government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it, upon condition that it should at all times transmit dispatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government, or any part of them, when lawfully required by the Secretary of the Treasury, the road, with all the rights, functions, immunities, and appurtenance thereunto belonging, and also all lands granted to the company by the United States which at the time of the default should remain in the ownership of the company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General government. Notwithstanding this, the railroad and the

telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation" (pp. 31-32).

The court proceeded to answer the question in the negative. It rejected the argument that, merely because the corporation received its charter from the Federal Government, it was a tax immune instrumentality and it outlined the dangers which would result if all those private corporations which performed services for the government were exempt from State taxation: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon al-

most every railroad. Telepraph lines are employed in the National service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited" (p. 33).

The court held that, as long as the tax did not interfere with the performance of the function served by the private corporation involved, it was not *impliedly* immune from the State taxation.

The *Peniston* case was followed in *Broad Riv. Power Co. v. Query* (288 U. S. 178), in which the court upheld a tax on the production and sale of electricity generated by a hydroelectric company which constructed and operated its plant by permission and under supervision of the Federal Government. The court speaking through Chief Justice HUGHES, wrote (pp. 180-181): "It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of,

and cannot be said to burden, any governmental funtion. * * *. The tax is not laid upon the license granted by the Federal Water Power Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing and selling an article of trade. * * * The product is property. The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid" (See, also, *Williams v. Talladega*, 226 U. S. 404, 416; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 549; *Alward v. Johnson*, 282 U. S. 509; *Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U. S. 325).

It is clear from the cases cited and discussed that privately owned and operated business enterprises which perform services for the government and/or exist and operate by virtue of a Federal charter or franchise are not *per se* immune from nondiscriminatory State taxation which does not impede the performance of their service for government or the privilege granted by the government charter or franchise granted. As Justice Stone wrote in upholding a New York State nondiscriminatory tax upon a corporate franchise, notwithstanding the inclusion of tax exempt income in the measure of it: "This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both

the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other" (*Educational Films Corp. v. Ward*, 282 U. S. 379, 391-392; see, also, *Reconstruction Fin. Corp. v. Beaver*, 328 U. S. 204; *cf. United States v. Yazell*, 382 U. S. 341).

We turn then to the original question posed—given the background of the cases upon which the Liberty National Bank and Trust Company relies and the further decisions of the Supreme Court in defining instrumentalites for tax immunity purposes, is the bank entitled to a constitutionally implied immunity from State taxation as an instrumentality of the Federal Government? We conclude that the answer is that it clearly is not.

National banks, though federally chartered, are privately owned and operated primarily for the private benefit of their owners. Like State chartered banks, they are depositories for Federal funds—indeed, legislation forbids discrimination for that purpose between State and national banks which are members of the Federal Reserve System (U. S. Code, tit. 12, § 265).[4] In addition, like any private enterprise or individual engaging in activities affected with a public interest, they are subject to severe Government regulation. This regulation, accomplished via membership in the Federal Reserve System (membership which is open to State banks on a voluntary basis [U. S. Code (1964), tit. 12, § 321]), is, however, hardly sufficient

[4] Over one fourth of all moneys subject to Federal Reserve System Regulation are in such State chartered banks. (National Summary of Accounts and Deposits in All Commercial Banks, Federal Deposit Insurance Corporation, June 30, 1966.)

to render national banks an instrumentalities of the Federal Government so as to entitle them to the same immunity from taxation as the Government itself (*Railroad Co. v. Peniston, supra; Broad Riv. Power Co. v. Query, supra; Western Union Tel. Co. v. Massachusetts, supra; cf. Spevack v. Klein,* 385 U. S. 511, 520 [concurring opn. of FORTAS, J.]).

Moreover, we are dealing here with a nondiscriminatory tax, immunity from which, it is conceded, will give national banks no more than an "imperceptible economic advantage" (respondent's brief, p. 18) over their State competitors and we assume, conversely, that nonimmunity from the tax will have little or no effect on their operations or the services they perform for the Government. Under these circumstances, we see no basis in law or logic for immunizing national banks from the taxation with which we are concerned here.

Such cases as *Colorado Nat. Bank v. Bedford* (310 U. S. 41, *supra*) and *Department of Employment v. United States* (385 U. S. 355, *supra*) upon which the bank relies do not conflict with this conclusion.

In the *Colorado Nat. Bank* case the Supreme Court held that, in the absence of contrary legislation by Congress, a State law laying a percentage tax on the users of the safety deposit services of banks measured by the banks' charges for the services, and requiring the banks to collect the taxes and account for them to the State and include them in their bills for the services, was valid.

The case was decided in 1940, and the court recognized that the national bank's usefulness as an agency to provide for currency "has diminished markedly" (p. 48) and merely "*assum[ed]* * * * that its banking operations are

free from state taxation except as Congress may permit" (p. 50; emphasis added).

The basis of the court's decision was that the tax was not on the bank as the owner of the safe deposit box but rather that it was upon the customer as the user. If the tax had been upon the bank as the owner of the box, the bank would have passed the tax on to the customer and, since it was responsible for the collection of the tax in any event, it becomes rather clear that the distinction drawn by the court was one without a difference.

The court went on to note significantly that the burden placed upon the bank to collect and remit the tax did not pose an unconstitutional burden.

In light of the court's language as well as the result reached, we cannot agree that this case precludes us from reconsidering prior case law. Indeed, highly technical distinctions of the kind made by the court in deciding this case, in areas badly in need of re-examination, have often been preludes to the ultimate rejection of old and no longer rational precedent. (Compare *Goldman v. United States,* 316 U. S. 129, and *Silverman v. United States,* 365 U. S. 505, with *Katz v. United States*, 389 U. S. 347.)

The reasoning of the second case relied on by the bank clearly supports our conclusion regarding the status of national banks. In *Department of Employment v. United States* (*supra*) the court held that the American National Red Cross was a tax-immune instrumentality of the Federal Government. The court's analysis is significant and instructive. Mr. Justice FORTAS, speaking for the court, wrote (385 U. S., *supra,* pp. 358-360): "Although there is no simple test fc ascertaining whether an institution is so closely related ᴗ ‑overnmental activity as to be-

come a tax-immune instrumentality, the Red Cross is clearly such an instrumentality * * * Congress chartered the Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit * * * Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors * * * By statute and Executive Order there developed upon the Red Cross the right and obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensible to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status as an arm of the Government."

The contrast between activities and functions of the American National Red Cross and that of the Liberty National Bank and Trust Company is so striking that no further elaboration is required.

We must note, however, as the bank points out, that there is dictum in the Red Cross opinion which supports its contention on this appeal. Thus the court wrote (p. 360): "In those respects in which the Red Cross differs from the usual government agency—*e.g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e.g.*, national banks—whose status as tax immune instrumentalities of the United States is beyond dispute."

If the Supreme Court had dealt with the precise problem with which we are concerned here—namely the status of national banks—we would, of course, follow that decision without question. We believe that the court's reference to national banks is clearly understandable in the context in which it was rendered, since the precedents cited and discussed earlier have never been rejected and the status of national banks as taximmune instrumentalities was not disputed in that case. It is obvious, however, that the *reasoning* of the court's decision and its holding squarely support the position we take here and the similar position recently taken by the Supreme Judicial Court of Massachusetts (*First Agric. Nat. Bank of Berkshire County v. State Tax Comm.*, 229 N. E. 2d 245 [Mass., 1967]). Until the Supreme Court holds that *national banks of today* are to be deemed immune from contributing their fair share of the taxes necessary to enable State and local governments to provide the essential services from which the banks themselves benefit, we decline to do so.

We, of course, recognize that, even though the bank is not automatically entitled to a constitutional immunity from taxation, Congress has the power to immunize national banks and other federally chartered institutions from this type of taxation. There is, however, no such statute presently in effect.

Section 548 of title 12 of the United States Code, the only Federal statute dealing with State taxation of national banks, is merely designed to insure that the inherent taxing powers which were recognized in *M'Culloch v. Maryland* (*supra*)—*e.g.*, the power to tax the real property of the banks as well as the privately owned shares—be exercised in a nondiscriminatory fashion. As the Supreme Court recently wrote: "Congress enacted the Section in 1864

and this Court has passed on it over 55 times in the near century of the Section's existence. During that period the Court has kept clearly in view, as was said in the last case in which it wrote, that 'the various restrictions [§ 548] * * * places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class.' " *Michigan Nat. Bank v. Michigan,* 365 U. S. 467, 472-473.)

There is nothing whatever in the statute which indicates an intent to immunize national banks from nondiscriminatory State taxation such as this and "[T]he immunity formerly said to exist on constitutional implication cannot now be resurrected in the form of statutory implication" (*Oklahoma Tax Comm. v. United States,* 319 U. S. 598, 604). "If it appears that there is no ground for implying a constitutional immunity, there is equally a want of any grounds for assuming any purpose on the part of Congress to create an immunity." (*Graves v. New York ex rel. O'Keefe,* 306 U. S. 466, 480, *supra*; see, also, *Oklahoma Tax Comm. v. Texas Co.,* 336 U. S. 342, 365-366.)

We note in conclusion that the problems which face State and local governments in meeting their responsibilities in our complex society require the expenditure of vast amounts of money. The Liberty National Bank and Trust Company has not presented us with a single rational argument, aside from a string of cases which were relevant in another time and under different circumstances, why it should not, like any other individual or business enterprise, contribute to the costs. We perceive none.

We wish to take special note of the exceptionally well-written and researched briefs submitted by both parties.

The order of the Appellate Division upholding the tax-immune status of the Liberty National Bank and Trust Company should be reversed, with costs, and the petition should be dismissed.

Chief Judge Fuld and Judges Van Voorhis, Burke, Scileppi, Bergan and Breitel concur.

Order reversed, etc.